92-22

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

In Re: APEX OIL COMPANY, et al.,
Debtors.

APEX OIL COMPANY, et al.,
Petitioners,

vs.

CLARK OIL & REFINING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Were Debtors Apex Oil Company, et al.[1], denied due process of law when the United States Bankruptcy Court, following a hearing that was held to set *preliminarily* the amount of a claim, instead, without timely notice to Debtors, made a *final* decision allowing a claim in the amount of $7,709,414.56?

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[1] The Debtors include Apex Oil Company (now known as Novelly/ Goldstein Partnership) and the 52 affiliated entities that are Debtors and Debtors in Possession in these procedurally consolidated and jointly administered Chapter 11 cases. The affiliated entities are: Apex Holding Co.; G.I.C. Holding Company; Goldstein Oil Co.; N.I.C. Holding Company; Novelly Oil Co.; Apex Aeronautics, Inc.; Apex Alaska, Inc.; Apex Bunkers, Inc.; Apex CM, Inc.; Apex Coal, Inc.; Apex Coal Lands, Inc.; Apex Coal Properties, Inc.; Apex Contract Drilling, Inc.; Apex Flite Fuels, Inc.; Apex Fuels Co.; Apex Kansas, Inc.; Apex Leasing, Inc.; Apex Louisiana Company; Apex Ocean Sun Co.; Apex Ocean Wave Company; Apex Oil Company, Inc. (formerly known as OC Oil & Refining Corporation, formerly known as Clark Oil & Refining Corporation); Apex Petroleum Fuel Blending, Inc.; Apex Producing Co.; Apex R.E.&T., Inc.; Apex Second Drilling Company; Apex Shipping, Inc.; Apex Transportation, Inc.; Apexco Exploration & Production, Inc.; Brixham Corporation; Bulk Terminals Company; Clayton Tankers, Inc.; Colt Resources, Inc.; Cornwall Properties, Inc.; Crest Tankers, Inc.; Dartmoor Corporation; Dixit Corp.; E.D.G. Properties, Inc.; Enterprise Development Group, Inc.; Glacier Bay Transportation Corporation; Greenfield Enterprises,Inc.; Hogwild Estates, Inc.; Mathiasen's Tanker Industries, Inc.; OC Acquisition, Inc. (formerly known as Clark Acquisition, Inc.); OC Estoril (formerly known as Clark Estoril Corp.); OC Oil Corp. (formerly known as Clark-Owens Oil Corp.); OC Oil Producing Co. (formerly known as Clark Oil Producing Co.); OC Palma Corp. (formerly known as Clark Palma Corp.); OC Pipe Line Company (formerly known as Clark Pipe Line Company); Petroleum Fuel & Terminal Company; Second Knights Bridge Properties, Inc.; Third Knights Bridge Properties, Inc.; Trinidad Corporation and 240 East 60 St. Building, Inc.

RULE 29.1 LIST

The following entities have a pecuniary interest in the outcome of this case:

Apex Oil Company (now known as Novelly/Goldstein Partnership)

Apex Oil Company, Inc.

Clark Oil Trading Company

Novelly Oil Co.

Goldstein Oil Co.

Clark Oil & Refining Corporation

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Apex Oil Company and related entities, respectfully pray that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on March 6, 1992.

OPINIONS BELOW

On July 5, 1991, the United States District Court for the Eastern District of Missouri, affirmed prior orders of the Bankruptcy Court of April 24, 1990 and May 30, 1990. Those decisions are not reported. On March 6, 1992, the United States Court of Appeals for the Eighth Circuit affirmed the decision of

the district court. *Apex Oil Co. v. Clark Oil Co. & Refining Corp.*, 958 F.2d 243 (8th Cir. 1992).

JURISDICTIONAL STATEMENT

The Bankruptcy Court's initial jurisdiction to adjudicate this claim arising during the course of Apex's Chapter 11 proceedings was properly founded on 28 U.S.C. §157(b)(2)(B). Petitioners invoked the appellate jurisdiction of the District Court under 28 U.S.C. §158(a) by notice of appeal filed June 7, 1990.

The District Court entered its final judgment sustaining the order of the, District Court on July 5, 1991. Petitioners filed their notice of appeal to the Eighth Circuit Court of Appeals on August 2, 1991. Jurisdiction of that court was properly invoked under 28 U.S.C. §1291 and 28 U.S.C. §158(d). The decision of the Eighth Circuit Court of Appeals affirming the District Court was filed on March 6, 1992. Petitioners' timely Petition for Rehearing was denied on April 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

"No person shall be . . . deprived of life, liberty or property without due process of law."

U.S. Const., Amend. V.

STATEMENT OF THE CASE

The constitutional issue here presented grows out of a contract case, arising from an Asset Purchase Agreement by which certain assets of Petitioners, Chapter 11 Debtors Apex Oil Company and various affiliates,[2] were sold to Clark Oil &

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[2] Petitioner Apex Oil Company and the debtors affiliated with it are referred to collectively as "Apex" throughout this brief. Respondent Clark Oil & Refining Corporation (formerly AOC Acquisition Company) is referred to as "Clark."

Refining Corporation. The Asset Purchase Agreement called for a payment to Apex, at the time of closing, of cash sufficient to raise Apex's retained working capital to $15,000,000. The amount of the payment at closing was to be based on a determination made by Apex.

The Asset Purchase Agreement provided for a post-closing adjustment process, whereby the parties were to attempt retrospectively to agree on what the true retained working capital had been on the date of closing. If it were discovered that the amount paid at closing raised the actual retained working capital above $15,000,000, Apex would refund the difference. If the payment at closing were too small, Clark would make an additional payment.[3]

The Asset Purchase Agreement provided as follows:

> For purposes hereof, to the extent that Closing Retained Working Capital is not finally determined as of the Closing Time, Apex on behalf of Seller shall make a good faith estimate thereof and the Cash Payment shall be determined for purposes of the Closing on the basis of such estimate. Not later than thirty (30) days after the Closing Date, Apex will furnish to Purchaser financial statements showing the Closing Retained Working Capital as of the Closing Time and reasonable supporting detail of the computation thereof to allow a review thereof. Not later than thirty (30) days following the delivery by Apex of such financial statements and detail to Purchaser, Purchaser shall either accept or dispute the Closing Retained Working Capital showing therein and shall give notice thereof to Sellers. If Purchaser accepts such Closing Retained Working Capital, or, in the

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[3] The events leading up to the Asset Purchase Agreement are set forth in greater detail in an earlier reported opinion of the Bankruptcy Court approving the transaction. *In re Apex Oil Co.*, 92 Bankr.R. 847 (Bankr.E.D.Mo. 1988).

> event of dispute, upon final determination thereof, an appropriate payment will be made by Sellers or Purchaser, as the case may be, to reflect the adjustment (if any) to the estimated Closing Retained Working Capital, together with interest on the amount of such payment from the Closing Date through the date of such payment at a rate of interest per annum equal to the base rate from time to time announced by Centerre Bank National Association.

The transaction closed on November 22, 1988. Apex estimated that retained working capital as of that date was $3,788,539. Clark accordingly paid $11,211,461 as the working capital payment contemplated by the agreement (Tr. at 28-29).

The parties never reached an agreement on the correct closing working capital amount. Clark accordingly filed a claim in the Apex bankruptcy for an amount it claimed it had overpaid. It sought the allowance of this claim as an administrative claim under §503(b) of the Bankruptcy Code. The amount of Clark's total claim as allowed (the bulk of which was the challenged working capital adjustment) was $7,014,362.98 plus interest, a total of $7,709,414.56.

Because Clark's claim arose out of a post-petition contract with Apex, it was an administrative claim under 11 U.S.C. §503(b)(1), entitled to first priority payment under 11 U.S.C. §507(a)(1). Thus, pursuant to the provisions of 11 U.S.C. §1129(a)(9)(A), unless Clark otherwise agreed — which it did not — Apex's reorganization plan could not be confirmed unless provision were made to pay Clark on the later of the effective date of the plan or the date when the claim was finally liquidated. Clark had objected to the confirmation of Apex's plan because the plan contained no provision for payment of Clark's administrative claim (Tr. at 7).

Under normal circumstances, Apex would have objected to Clark's claim and, pursuant to the procedure set forth in 11

U.S.C. §502 and the Federal Rules of Bankruptcy Procedure, would have engaged experts, conducted discovery and ultimately tried the claim and the objection thereto before the bankruptcy court. The resulting judgment would have liquidated Clark's claim, and Apex would have known the exact dollar amount of the cash payment it had to make to Clark on the effective date of the plan. Here, however, the exigencies of the circumstances precluded Apex from following normal procedures. It was not possible to prepare for and conduct a full hearing on this claim prior to the confirmation hearing. The parties therefore attempted to reach agreement on a more summary procedure.

The parties and the Court believed the parties had reached a stipulation as to the nature and scope of the hearing to be held. In connection with Apex's Motion for Reconsideration both Clark's counsel (Mr. Howard Roin) and Apex's counsel (Mr. Richard Berger) filed after-the-fact affidavits setting forth their respective positions as to what agreement had been reached.

Mr. Roin stated that Clark's position was two-pronged; first, "that the working capital adjustment should be determined based on the January 23, 1989 Apex financial statement" and that if this position were found correct, "then a battle of accountants concerning newly-prepared financial statements would be unnecessary and irrelevant." If, however, according to Mr. Roin, the January 23 financial statements were not determinative, "then it appeared that the parties would have to conduct a battle of accountants to determine the proper amount of the working capital adjustment." Mr. Roin acknowledged that he and Mr. Berger agreed that if that were the case it would not be possible to conduct the "battle of accountants" within the short time frame allowed for the April hearing and that the parties "should agree to estimate the value of Clark's claim for security purposes prior to the confirmation hearing, and to resolve the amount after the hearing."

Mr. Berger, in contrast, stated in his affidavit that the parties had agreed that the administrative claim "had to be estimated." Apex initially took the position that the number derived at the hearing should cap Clark's recovery; the parties later agreed it would not be a cap.

This issue had been a subject of discussion before the court on March 28, but no transcript was prepared of that proceeding. The contemporary transcribed record of the parties' understandings on these points is as follows:

First, at a deposition on April 16, Clark's counsel, Mr. Roin, agreed that the hearing would be for the purposes of estimation for security, with either party having further rights if there was a dispute on the merits of the allowance of the claim. The following colloquy occurred at that deposition:

> MR. BERGER: We've agreed that the Debtors will not assert as an offset to the administrative claim for the purpose of this estimation hearing the letter of credit item or any of the merits or demerits of the letter of credit item identified as item 18 on the last page of Exhibit 6. *This is without prejudice to the rights of either side to argue that matter at a subsequent date.* The reason for that is, the hearing schedule for this Thursday is *an estimation hearing*, the purpose of which, we believe, is to establish a cap for the security that is to be given to AOC, if any, on its administrative claim.
>
> MR. ROIN: I hate to do this: I want a slight clarification. This is not a cap on the *amount--we all agree that the estimation hearing will not cap the amount that New Clark or AOC may be entitled to when that amount is finally determined.*
>
> MR. BERGER: We agree that the hearing on Thursday does not limit the right of either party to recover against the

other party. *The merits of that dispute will be litigated at another time.*

Mr. ROIN: *And just to be clear, my understanding is that the purpose of the hearing is to estimate the value of our claim;* right?

Mr. BERGER: For our purposes of—

MR. ROIN: *Security.*

MR. BERGER: Security.

Nicolet Depo. (April 16, 1990) at 86-88 (emphasis added).

Clark's counsel then pointed out that a second hearing on the merits of the claim would have to take place with the parties having to repeat the same discovery to prepare for that second hearing:

MR. ROIN: We agree to all that stuff. I suppose there's one other thing we just mentioned, which is that *the discovery in this case has been expedited to truly unbelievable heights, and we both agree that we may need to do some or all of this discovery over again when and if we have a dispute on the merits of the allowance of the claim.*

Id. (emphasis, added).

On April 19, 1990, at 9:30 a.m., less than six hours before the estimation hearing was to begin, the Bankruptcy Court conducted a status conference to gauge the length of the estimation hearing. In his initial colloquy with the Bankruptcy Court, the Debtors' counsel (Mr. Berger) reported on the stipulation with Clark about the nature of the hearing:

MR. BERGER: . . . it is our joint estimate that the case will take, *on an estimation basis, estimating only for the purpose of whether there is security* and how much security

has to be posted post-confirmation *until we litigate the whole claim.* We estimate that *the estimation hearing* will take about a day and a half.

* * *

THE BANKRUPTCY COURT: On the value of secured property?

MR. BERGER: No. On the amount of security, if any, that we would have to put up post-confirmation *pending resolution--full liquidation of the claim* . . . .

(Tr. of April 19, 1990 at 2-3) (emphasis added). In the following exchange with the Bankruptcy Court, Clark's counsel (Mr. Roin) unequivocally confirmed that the estimation hearing would not liquidate, but only estimate the claim:

THE BANKRUPTCY COURT: Well, I don't understand. If we're going to completely liquidate the claim, why are we getting into an estimation of reserving?

MR. ROIN: Your Honor, *we did not anticipate that the estimation hearing would address what to do with the number of the estimation.* We thought that issue would be *once we've determined the estimated value of the claim,* then we would, in a sense, be able to go forward on Tuesday with our objection to the plan, based on a claim which now has a proved number to it.

THE BANKRUPTCY COURT: *Let's be clear on what we're doing starting tomorrow. Are we liquidating this claim* which is I thought what we were here to do?

MR. ROIN: *No, Your Honor, we are estimating the value of the claim.*

THE BANKRUPTCY COURT: For purposes of allowance for treatment under the plan.

* * *

Mr. BERGER: Your Honor, there's an underlying issue and that is whether there will be security required. We do have to, in any case, liquidate this contested large administrative claim. We have to estimate it for *purposes of seeing how we're going to work with it under the plan.*

MR. MOORE (also counsel for the Debtors): Your Honor, in terms of proving feasibility, we'll need to know not only what number is going to be estimated, but also how the Court is going to require the debtors to treat that estimated number as an administrative expense claim. And therefore it impacts on our subsequent proof as to feasibility. *My understanding is that both parties have reserved their rights post-confirmation to continue to litigate the ultimate allowance of the actual administrative claim.* And what we're really talking about now, and incidentally there are issues I know that the debtors will not have raised and presumably that (Clark] may not have raised that would be litigated. This is only for purposes of (Clark) determining what level of protection at this point in time that it is going to try to assert in terms of a feasibility analysis.

(Tr. of April 19, 1990 at 8-9) (emphasis added).[4]

At the outset of the hearing on April 20, 1990, Mr. Roin stated Clark's understanding of what was to occur:

"I've taken Your Honor's suggestion from the pretrial and I will not repeat the arguments made in our trial brief,

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[4] The Debtors' interest in obtaining a pre-confirmation estimation of Clark's administrative claims was well-founded. *See In re Pizza of Hawaii*, 40 Bankr. 1014, 1017 (D.Haw. 1984), *aff'd* 761 F.2d 1374, 1382 (9th Cir. 1985) (bankruptcy court must estimate a disputed claim before plan feasibility can be determined, especially when the ultimate resolution of the claim will delay confirmation).

> and I know the court is well-versed in our two pronged approach at this estimation hearing. And because it's an estimation hearing, we're simply estimating, not liquidating the claims. . . .
>
> What we're asking the court to do is to estimate the value of that claim, and we believe that *if the claim was resolved in early 1989,* that estimation would be a basis for ultimately liquidating the claim without further hearings. *If, on the other hand, the court finds that there was no resolution in accordance with the contract in early 1989, then we recognize that it may be appropriate to have further proceedings to liquidate the final amount of the claim.*

(Tr. at 7-11) (emphasis supplied).

The Court itself made certain statements at the outset of that hearing:

> "By agreement of the parties, this hearing will be conducted as an estimation of the claim, and that amount will be liquidated for purposes of treatment under the plan."

(Tr. at 5.)

After the opening statement, the court said:

> "Mr. Roin, what we'll do today . . . . [is] liquidate the claim by process of estimation, reserving so much of your objection as goes to feasibility of the plan, as well as the treatment which your claim will receive, either cash confirmation or such other . . . payment terms as you may consent to, so those two latter issues will be reserved."

(Tr. at 11.)

Contrary to the agreed purpose of the hearing as a *preliminary* estimation of Clark Oil's claim, the Bankruptcy Court, without timely notice to Apex, made a *final* decision as to the amount of

the claim. The Bankruptcy Court delivered its findings and conclusions from the bench on April 23, 1990. The Bankruptcy Court found that:

> Clark shall be allowed under Section 503(b)(1) as an expense of administration claim the sum of $5,862,545, $471,969, and $350,352, for a total of $6,684,866, together with interest provided under Section 3.1."

The Bankruptcy Court denied Apex's motion for reconsideration.

The District Court essentially adopted the Bankruptcy Court's reasoning. The District Court concluded that Judge Schermer had, the morning of the hearing, made his intention to liquidate the claim unequivocally clear, so that Apex's due process claim was without merit.

The Eighth Circuit Court of Appeals affirmed. Appellants' Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for writ of certiorari because the decision of the Eighth Circuit Court of Appeals is in conflict with this Court's decisions on the standards of procedural due process and is in conflict with decisions from other circuits which have held under any analogous body of law that a court may not transform a preliminary hearing to a final hearing without adequate and unambiguous prior notice. *See* Sup.Ct.R.10.

I. THE DISTRICT COURT DENIED APEX DUE PROCESS OF LAW BY FAILING TO GIVE NOTICE OF THE FINALITY OF THE APRIL 20-21 HEARING.

Fifth Amendment standards of procedural due process are fully applicable to proceedings under the Bankruptcy Code. *See, e.g., Reliable Electric Co.. Inc. v. Olson Construction Co.*, 726 F.2d 620 (lOth Cir. 1984); *Matter of Siegler Bottling Co.*, 65 Bankr.R. 117 (S.D. Ohio 1986). When the purpose of a hearing is to determine whether a person is to be deprived of property, due process requires that he be given notice thereof. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). "Parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right they must first be notified." *Goss v. Lopez*, 419 U.S. 565, 579 (1975), *citing, Baldwin v. Hale*, 1 Wall 223, 233 (1864).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co., supra*, 339 U.S. at 314. One purpose of the notice required by due process is "to permit adequate preparation for an impending 'hearing'". *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978).

In the case at bar, while Apex was notified there would be a hearing beginning on April 20, 1990 on Clark's claim, it was not notified that this hearing would lead to a final liquidation of the claim. Even under the interpretation of the record advocated by Clark in the courts below (an interpretation belied by the ambiguity of the April 20 transcript) notice of the finality of this proceeding was not given until April 20 - too late to be of any use to Apex in preparing for the hearing.

Understanding Apex's position requires examination of events leading up to the April 20 hearing. Careful review of the various pre-hearing statements of the parties and the Bankruptcy Court shows two propositions that were common ground: (1) The principal purpose of the expedited summary hearing was to estimate the claim so that at the confirmation hearing it could be determined what assurance of payment, if any, Apex would have to post to establish the feasibility of its plan; and (2) if Clark failed in its argument that the parties had agreed in early 1989 to adopt an unsigned Arthur Andersen report as the definitive statement of working capital at time of closing, the parties recognized that more extensive preparation and further proceedings would be needed to resolve the difficult accounting issues presented.

That the purpose of this hearing was to fix the amount of the security (if any) which would be required is demonstrated first by the colloquy at the April 16 deposition:

> MR. ROIN: And just to be clear, my understanding is that the purpose of the hearing is to estimate the value of our claim; right?
>
> MR. BERGER: For purposes of-
>
> MR. ROIN: Security.
>
> MR. BERGER: Security.

The parties informed the court of their agreement on this point on April 19, with no contradiction by the Court:

> The Bankruptcy Court: Let's be clear on what we're doing starting tomorrow. Are we liquidating this claim which is I thought what we were here to do?
>
> MR. ROIN: No, your Honor, we are estimating the value of the claim.
>
> THE BANKRUPTCY COURT: For purposes of allowance for treatment under the plan.
>
> MR. ROIN: Essentially for security purposes.

(Tr. of April 19, 1990 at 8.)

Counsel for the debtors, Mr. Moore, told the court at that hearing (without demur by the court) as follows:

> My understanding is that both parties have reserved their right post confirmation to continue to litigate the ultimate allowance of the actual administrative claim.

(*Id.* at 9.)

Thus, it is clear that when both parties used the term "estimation" in connection with this hearing, they were talking about an estimation to be performed only for purposes of determining security so that the Court could evaluate the feasibility of the Apex reorganization plan.

The second crucial point is equally well demonstrated: Both parties understood that, at least in the case where the court concluded that this matter was not resolved by agreement of the parties in accordance with the contract in early 1989, further proceedings would be necessary. Mr. Roin himself so stated in his opening statement (Tr. at 11).

All of the courts below, the Bankruptcy Court in denying reconsideration (Tr. of May 30, 1990 at 20), the District Court in affirming (District Court Order, Appendix B at A-10), and the Eighth Circuit in affirming the District Court, 958 F.2d at 244, held that whatever confusion might have existed in the minds of the parties, the Bankruptcy Court was clear as to what was happening, and made itself clear at the outset of the April 20 hearing. This notification was supposedly sufficient to avoid any due process problem. The statements of the Bankruptcy Court that allegedly cured any problem were these:

> In the matter of Apex Oil Company, the objection of Clark Oil and Refining Corporation to the Debtor's first amended plan. And while its styled an objection, it will be treated as a liquidation of the post-petition 507(a)(1) claim. By agreement of the parties, this hearing will be conducted as an estimation of the claim, and that amount will be liquidated for purposes of treatment under the plan.

(Tr. at 5.)

Secondly, the court said after Mr. Roin's opening statement:

> Mr. Roin, what we'll do today . . . [is] liquidate the claim by process of estimation, reserving so much of your objection as goes to feasibility of the plan, as well as the treatment which you claim will receive, either cash confirmation or such other . . . payment terms as you may consent to, so those latter issues will be reserved.

(Tr. at 11.)

There are two reasons why these pronouncements by the Bankruptcy Court do not cure the due process violation resulting from failure to give notice as to the finality of the hearing.

(a) The Bankruptcy Court's Pronouncements are not "Unequivocal".

The Bankruptcy Court indicated at the outset of the April 20 hearing that the procedure that it was to follow was to be "by agreement of the parties" (Tr. at 5). There could have been no doubt in anyone's mind that it was the agreement of the parties that there be further proceedings, at least if it were found that there had not been agreement in early 1989 on the amount of the adjustment. Thus, when the Bankruptcy Court indicated that it was going to conduct an estimation "by agreement of the parties" and the claim would be liquidated "for purposes of treatment under the plan" the parties must have understood that statement to refer to the assumed stipulation between the parties, which in both parties' formulations left open the possibility of further proceedings and contemplated an estimation only for purposes of treatment under the plan; *i.e.*, for purposes of security.

Likewise, the Court's supposedly unequivocal statement at the close of Mr. Roin's opening statement left open certain issues that would be adjudicated later ("so much of your objection as goes to the feasibility of the plan" and "the treatment which your claim will receive . . . either cash confirmation or such other payment terms as you may consent to") (Tr. at 11). The scope of those issues was far from clear.

Thus, contrary to the Bankruptcy Court's after-the-fact interpretations of its own pre-hearing statements, and the acceptance thereof by the District Court, in fact at no time prior to the hearing had the Bankruptcy Court given the parties notice that this hearing was for purposes of "estimation for purposes of allowance," with no further proceedings ever to be had on the Clark administrative claim.

Rather, the first time the parties were so notified was at the end of the proceedings. After the Bankruptcy Court had read its findings and conclusions from the bench on April 23, for the first

time, the Court told the parties, "I have found it; I don't intend to hear it again . . ." (Tr. of April 23, 1990 at 20). Apex's counsel, Mr. Berger, states that this is the first time he learned he would not have the opportunity to present further evidence (Berger Affidavit, ¶24). He immediately expressed a desire for further hearing to adduce all the evidence on the disputed issues (Tr. of April 23 at 19).

(b) Even if this notice as to the conclusive nature of the hearing was unequivocal, it came too late to be fair notice.

Fundamental due process requires fair notice and warning, *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 (8th Cir. 1981). These due process concepts are cornerstones of bankruptcy law. *See In re Rene Press, Inc.*, 29 Bankr. 446, 448 (Bankr. 1st Cir. 1983) (due process denied where claimant not given opportunity to respond to arguments of the U.S. Trustee and Debtor in opposition to his claims); *Odom Enterprises, Inc. v. Internal Revenue Service*, 25 Bankr. 313, 315 (E.D.Ark. 1982) (dismissal with prejudice without notice of intent that dismissal be without prejudice constitutes reversible error).

As shown above, a purpose of notice is to give opportunity to prepare for a hearing. Notice which is given so late as to afford no opportunity to act is not fair notice; it is the functional equivalent of no notice at all.

An instructive analogous body of case law is found under Fed.R.Civ.P. 65(a)(2). Since 1966 that Rule has permitted a District Court to consolidate a preliminary injunction hearing with a trial on the merits. The Court may order such a consolidation even "after the commencement of the hearing." Shortly after the rule took effect, the courts imposed a notice requirement not contained in text of the Rule: "The parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing

commences or at a time which will still afford the parties a full opportunity to present their respective cases." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), citing *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972); and *Nationwide Amusements Inc. v. Nattin*, 452 F.2d 651 (4th Cir. 1971). Several decisions have recognized the due process basis of this requirement. *Penn v. San Juan Hosp. Inc.*, 528 F.2d 1181, 1187 (5th Cir. 1975); *Gellman v. State of Maryland*, 538 F.2d 603, 604 (4th Cir. 1976); *Update Art. Inc. v. Charnin*, 110 F.R.D. 26, 36 (S.D.N.Y. 1986); *Able Sheet Metal. Inc. v. First Bank & Trust of Jonesboro*, 15 Bankr. 878, 882 (E.D.Ark. 1981).

In the case at bar, Apex did not receive notice of the finality of the hearing in advance. The first clear notice of the finality of the hearing came on April 23, after the Findings of Fact and Conclusion of Law were delivered, when the Court said clearly for the first time that it did not intend to hear additional evidence on the claim. Such post-hearing notice clearly fails to satisfy due process standards. *Gellman v. Maryland, supra*, 538 F.2d at 604-606, *Update Art Inc. v. Charnin, supra*, 110 F.R.D. at 36.

Even if the Court's statements on April 20 are regarded as notice, that notice did not come in time to "afford the parties a full opportunity to present their respective cases." *Camenisch*, 451 U.S. at 395. Apex had barely a month's notice of Clark's claim, and less than that time to prepare for a hearing thereon. Time for the hearing itself was to be extremely limited, in light of other upcoming matters, most notably the hearing on the plan of reorganization. By pretrial agreement (reached when both parties thought the hearing would not be final), the parties were to disclose their witnesses and make them available for deposition prior to the hearing. The start of the hearing had been postponed from April 19 to April 20 to allow these depositions to be completed. Each party, in the week of discovery spent in prepa-

ration, had disclosed two such witnesses and made them available for deposition.[5]

The Court did not permit the parties to offer witnesses whom they had not previously disclosed and made available for deposition. Apex had chosen its two witnesses carefully: Mr. Nicolet, who could testify on the issue whether an agreement had been reached in February 1989 resolving this dispute, and its outside accountant, Mr. Siebert, who could testify to the proper resolution of various items on the working capital statement.

The notion that Apex, on being notified for the first time on the morning of April 20 that the summary hearing about to begin was conclusive for all time, could somehow have marshalled and presented all the evidence it might have presented at a full hearing on the merits, is ludicrous. It ignores the realities of trial preparation and the procedural posture of this case as of April 20, 1990.

The Bankruptcy Court said that the parties "put on all evidence they wished without time constraints" (Tr. of April 23 at 13). This ignores not only the time constraints of the hearing itself, which ended on Saturday afternoon April 21, but the more important constraints imposed by the short time period prior to the hearing available for discovery. All counsel were also faced with the demands of preparing for the April 25 confirmation hearing itself.

Any notice given by the Bankruptcy Court on the morning of the April 20 hearing as to the finality of that hearing was the equivalent of no notice at all; it was not given at such time as to enable Apex to prepare its full case on the merits.

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[5] Prior to that time, the outside accountants, Mr. Siebert for Apex and Mr. Kinman for Clark, had been preparing their reports on the working capital issue.

II. APEX WAS PREJUDICED BY THE FAILURE TO GIVE TIMELY, UNAMBIGUOUS NOTICE AS TO THE FINALITY OF THE HEARING.

It is self-evident that a $7.7 million claim involving a complicated accounting dispute spanning events of a year's time cannot be fully tried in two days with two witnesses per side. Had Apex been informed this would be its one and only hearing on this claim, other participants in the meetings involved would have testified. Further depositions on both sides would have been taken. Mr. Munk (the chairman of Clark) would have been deposed and perhaps his testimony offered. Other Clark executives (Mr. Delaney and Mr. Walter) would have been deposed. (*See* Berger Affidavit at ¶¶22, 24). Mr. Novelly (CEO of Apex) would have testified. Most importantly, Mr. Catanzaro — preparer of the draft working capital statement — would have been deposed and his testimony used.

The prejudice was compounded by the theory used by the Bankruptcy Court to resolve the case. As noted, it was Clark's principal theory in opening statement that the parties had actually reached agreement in early 1989 as to the amount of the working capital at closing, so that a so-called "battle of the accountants" was unnecessary (Tr. at 8). This was the main subject in dispute between the two fact witnesses who did testify — Mr. Melnuk for Clark and Mr. Nicolet for Apex. Apex was confident going into the hearing that it would win that issue, because there was no such agreement. The Asset Purchase Agreement contemplated, at a minimum, written notice from Clark that it had accepted a working capital figure proposed by Apex. It was undisputed that there had never been any such written notice. Apex won this issue, when the Court held in effect that no such agreement had been reached (Tr. of April 23 at 15).

Nonetheless, in its ruling announced on April 23, the Court held for Clark on the theory that, notwithstanding that there had

never been any agreement on the proper amount of the working capital adjustment, the parties were bound by the unsigned Arthur Andersen report, because this was the "best evidence available" at the time.

If Apex had been given notice this was to be its only hearing on this matter, and that this course of conduct evidence would be determinative, it would have conducted further depositions of all the actors. At a full hearing conducted after the confirmation of the Plan of Reorganization, testimony from Mr. Novelly and perhaps Mr. Munk could have been heard, enabling Apex to paint a full picture of the negotiating process, specifying the times and places and showing Apex's good faith. Other Clark executives who participated in the negotiations could have been deposed, and testimony favorable to Apex on this issue addressed. The effect of the Bankruptcy Court's orders was to deny Apex this opportunity.

Use of the "best evidence available" standard enabled the Court to avoid the lengthy hearing and complicated analysis that would have been required if the accounting issues were addressed on the merits. It also enabled the Court to avoid the anomalous finding that the parties had agreed to the working capital adjustment, when they clearly had not even on the limited record before the Court. Had the Court allowed the parties an opportunity for a full and fair hearing, however, it would have learned that the parties by their conduct had clearly departed from the time requirements of the contract, so that there was no basis to hold them to "the best evidence available" in the first sixty days.

A clear injustice was done by the combined actions of the Bankruptcy Court in first not advising the parties that the hearing was to be final and conclusive, and then basing its ruling on the "best evidence at the time" theory. The only appropriate course for the Bankruptcy court would have been to use the results of the

April hearing for purposes of estimation for security only, and reserve final allowance of the Apex claim until full discovery and a full hearing on the merits could be had.

CONCLUSION

Petitioner Apex Oil Company respectfully requests that this Petition for Writ of Certiorari be granted.

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APPENDIX

APPENDIX A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Procedurally Consolidated
Bankruptcy Case Number 87-03804-BKC-BSS
Honorable Barry S. Schermer,
United States Bankruptcy Judge

In re: APEX OIL COMPANY, et al,
Debtors.

April 23, 1990
Proceedings had before the Hon. BARRY S. SCHERMER.

GORE REPORTING COMPANY
408 OLIVE STREET, ST. LOUIS, MISSOURI 63101
(314) 241-6750

THE COURT: This is a continuation of our docket on the 23rd of April, and I had promised you all a decision in the matter of Apex Oil Company and the claim of Clark. Mr. Roin is here for the Claimant and Mr. Berger is here on behalf of Apex.

The following will become by findings and conclusions in this case.. The matter before the Court is the determination of the amount of the Clark Oil and Refining Corporation's post-petition administrative expense claim.

A hearing was held Friday, April 20th, and Saturday, April 21st, and at the conclusion of the hearing, I took this matter under advisement and announced that I would be ruling upon it at 10:00 o'clock this morning. The Court has jurisdiction pursuant to 28 USC 157(b)(2)(B), as this is a court proceeding in which the Court may enter appropriate orders and judgments.

Clark was formerly AOC Acquisition Corporation, and during the hearing, was variously referred to as Clark, Horsham, AOC, New Clark, or the Creditor. It asserts a claim under 11 USC section 503(b)(1)(A), which is entitled to priority under 11 USC Section 507(a)(1) in treatment under any Apex plan pursuant to 11 USC 1129(a)(9)(A).

Clark's claim arises out of the asset purchase agreement entered into by Clark and Apex along with other Apex debtor and non-debtor affiliates. The asset purchase agreement was entered into August 30, 1988 and approved by this Court on November 7, 1988, after a three-day hearing.

By the terms of the agreement, substantial assets of Apex were sold to Clark with the purchase price paid to groups of banks — pardon me, to a group of banks, holding secured claims against the estates of Apex. The closing of the sale took place November 22, 1988.

The detail of the transaction contemplated by the asset purchase agreement was previously reported at 92 BRA 47, and we need not describe it further, except to identify the two components of the Clark claim. The first is comprised of nonworking capital claims. Of this portion of the claim, the parties have stipulated that Apex owes Clark what I shall refer to as the Ohio sales tax claim of $471,969, and amounts due under an administrative service agreement of $350,3552. [sic]

In addition, Clark asserts nonworking capital claims of $2,014,000 for uncollected COTC payables — and we know that to be Clark Oil Trading necessary working capital at $15 million.

The asset purchase agreement then provided that Clark would pay Apex the difference between its working capital as determined to be at the closing, November 22nd, 1988, and $15,000,000.

The method of determination of the November 22, 1988, working capital of Apex is the focus of controversy between the parties.

Clark paid Apex $11,211,461 for working capital on November 22nd, 1988. This was based on an estimate of Apex's working capital as determined by Apex using its September 30, 1988, financial information. The asset purchase agreement provides in Paragraph 3.1F, at Page 16, that, and I'll now quote, "Not later than 30 days following the delivery by Apex such financial statements and detail to Purchaser, Purchaser shall either accept or dispute the closing retained working capital showing therein, and shall give notice thereof to Sellers. If Purchaser accepts the closing retained working capital or, in the event of dispute, upon final determination thereof, an appropriate payment will be made by Sellers or Purchaser, as the case may be, to reflect the adjustment, if any, to the estimated closing retained working capital, together with interest on the amount of such working capital" — pardon me, "together with interest on the amount of such payment from the closing date through the date of such payment at a rate of interest per annum equal to the base rate from time to time announced by Centerre Bank, National Association."

The parties understand and agree, I believe, that Centerre is now known as Boatmen's Bank. The parties have stipulated that they can compute the interest rate and that that is not going to be the subject of this opinion.

The parties verbally agreed, and noted by Apex in the margin of the executed asset purchase agreement, to extend the 30-day financial reporting date to 60 days following closing.

Shortly after closing, most Apex employees associated with the sale of assets, including professionals, were transferred to the employment of Clark. This included Mr. Joseph Catanzaro, who prepared the June 30, 1988, balance sheet, which we know as

Schedule 1.1C. He also prepared the 11.2-million-dollar estimate of working capital shortfall.

After closing, Mr. Catanzaro became the comptroller of Clark, but was, quote, "leased back" to Apex under the administrative service agreements.

In late January 1989 or early February 1989, Mr. Catanzaro met with Clark's counterpart, Mr. Melnuk, to discuss the account balance due Clark from — for working capital. Apex had prepared financial statements to determine what amount, if any, was to be refunded Clark pursuant to Paragraph 3.1 of the asset purchase agreement, in a fashion consistent with Schedule 1.1C. These schedules were submitted to Apex's CPA firm, Arthur Andersen, for audit. Financial statements form the basis of the determination of the closing retained working capital definition found in the, advanced in the asset purchase agreement.

Apex's statements showed working capital as of closing of $12,463,000; substantially higher than the $3,788,539 used at closing. Accordingly, after adjustments for inventory levels and other items, Apex would owe Clark for its overpayment at closing a working capital refund of $5,862,545, but Apex did not agree with its financial statements prepared within 60 days of closing.

Its C.P.A.'s, Arthur Andersen, prepared but did not sign a report of audit. The audit report comprises two pages, written but unsigned, by Andersen, and the financial statements prepared by Apex. The report is stamped "Preliminary, tentative, for discussion purposes only."

This report was the subject of a meeting between Mr. Melnuk and Mr. Catanzaro. This meeting took place in late January or early February 1989. At the meeting, Mr. Melnuk, on behalf of Clark, agreed with the working capital figure contained in the financial statement prepared by Apex, but such agreement was

never reduced to writing and sent to Apex, as was contemplated in the asset purchase agreement.

Mr. Catanzaro was selected by Apex to prepare the financial statement and worked for Apex through the administrative service agreement.

Another discussion took place at about the same time between Mr. Marc Nicolet, Chief Financial Officer of Apex, and his counterpart at Clark. At this meeting, Mr. Nicolet quickly concluded that there were significant differences between the position of the parties and that these differences involving determination of closing retained working capital could only be resolved between the presidents or chief executive officers of Apex and Clark, Messrs. Nevelly and Munk, respectively.

Mr. Nicolet testified of additional meetings between the parties which did not result in resolution of the issues. Apex's intercompany account records reflect the amount of working capital due Clark as follows: June 30, 1989, $7,243,943; September 30, 1989, $2,504,682; October 31, 1989, zero. The amount had been written off, due to it being classified as disputed.

On March 22, 1990, Clark timely filed its administrative expense proof of claim. It claimed working capital refund due of $5,862,545; Ohio sales tax, $471,969; amounts due under the administrative service agreement, $350,352; COTC payable $2.014 million; assorted intercompany transfers, $1,041,837, and interest on the sum of those numbers.

In response, Apex employed Arthur Andersen to audit its financial statements of closing retained working capital. Andersen issued its report on April 13th, which showed closing retained working capital of $5,473,000 as of closing, which, after adjustments, results in a refund due Clark of $639,000. Apex disputes the COTC payable as a wash, in the other assorted intercompany transfers.

The Andersen April 13, 1990, report contains one significant difference from its draft report of January 23, 1988. The 1990 report states, quote: "In our opinion, the accompanying combined statement of closing retained working capital, as defined, represents fairly, in all material respects, the closing retained working capital, as defined, pursuant to the asset purchase agreement as amended, and as interpreted by management, as set forth in Notes 2 and 3."

The phrase "and as interpreted by management" does not appear in the draft Andersen report January 23, 1988. Apex bases its position on the accuracy of its numbers as time passes. With the passage of time, fewer estimated are necessary and more precise calculations are available to it.

While not disagreeing with such a principle, Clark asserts that if the asset purchase agreement is not to be followed with respect to measuring working capital of Apex on date of closing, then it is due $23,816,000 because of the inconsistency between Apex's financial statements and Schedule 1.1C. The amount due Clark under its 23-million-dollar theory is set forth more fully in Exhibit 16.

The threshold issue is which date is controlling for purposes of determining the closing retained working capital, 60 days from closing or any later date.

Apex asserts that through the parties' course of conduct, that the 60-day calculation was not adhered to, because, one, there was no agreement in writing by Clark, and two, subsequent meetings between the parties indicated a change in the agreement and intent to alter the terms of Paragraph 3.1 of the asset purchase agreement.

Clark argues its conduct never altered the asset purchase agreement which does not envision a delay. The parties agree that the matter was heard as an estimation hearing without

development of every, or support for every particular item, but rather, in summary fashion.

However, the Court did not create a mechanism for hearing as it would typically at an estimation hearing and the parties put on all evidence that they wished without time constraints or procedural constraints imposed by the Court.

The Court is of the firm opinion that the terms of the asset purchase agreement have not changed, since the Court approved it after a long hearing on an objection raised by a creditor that the asset purchase agreement was a sub rosa plan or a device by Apex in breach of its duties to creditors.

The alleged course of conduct has not been proven by Mr. Nicolet's testimony of meetings between unspecified people at undisclosed times, all of which could not have been productive or in good faith, since he testified that only Mr. Munk and Mr. Novelly could resolve the matter. He testified that only recently did the two businessmen meet, and my inference was that the meeting was called in response to the litigation, as much as anything else.

As far as accompanying financial information with passage of time, the equity agreement is rejected. The principle is one which the Court agrees with, but is not one that the parties agreed to, nor the creditors relied upon when, through the Creditors Committee, they supported approval of the asset purchase agreement.

The express terms of the agreement dictated 30-day determination and submission of Apex financial statements. The parties did agree upon a 30-day extension to a total of 60 days. Clearly, then, at closing, the parties intended to adhere to the letter of the agreement.

Thereafter, Apex did prepare and submit financial statements which Mr. Catanzaro provided to Clark. Whether he was a Clark

employee at the time, it was known to Apex, who chose him to prepare the information, and it is not surprising to Apex that he provided that information to Clark.

I am not concluding that there was an agreement between Clark and Apex as a result of the Catanzaro-Melnuk meeting, but rather, based upon the information available at that time, I estimate the closing retained working capital to be $12,463,000, which means that Clark is due, after adjustments, $5,862,545. Both Apex's and Clark's calculations of closing retained working capital amount based upon financial information of Apex or accounting interpretation available and determined after January 1989, are rejected.

The best information of the information — Of the financial information available, the best evidence of the financial information available 60 days after closing is Apex's financial statements, Exhibit 4.

The fact that Arthur Andersen did not opine to an audit does not detract from my conclusion that this was the best evidence available. Accordingly, the Court rejects Clark's additional claim for $1.4 million and $2.04 million. Clark shall be allowed under section 503(b)(1) as an expense of administration claim the sum of $5,862,545, $471,969, and $350,352, for a total of $6,684,866, together with interest provided under Section 3.1

Gentlemen, if there is anything further, please advise me.

Mr. Roin, if you will prepare an order to that effect?

MR. ROIN: I will, Your Honor,

There is one issue that I would like to raise. What we have with the Court's ruling is an identification of the amount of our claim. The next step, we believe, is either a letter of credit or some kind of bond to cover that claim, with the — as part of the plan.

THE COURT: Well, you filed an objection to the plan. I think it's very clear, Mr. Berger is quite experienced; he understands 1129(a)(9)(A). He will pay you in cash or he will provide you treatment that you agree upon, and the reason, if you recall, or my recollection is, at least, that we wanted some passage of time between the announcement of the Court's decision and the confirmation hearing,and I determined one day was sufficient, so you have between now and tomorrow morning, the commencement of the confirmation hearing, to reach agreement with Mr. * * *

APPENDIX B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Procedurally Consolidated
Bankruptcy Case Number 87-03804-BKC-BSS
Chapter 11

Honorable Barry S. Schermer,
United States Bankruptcy Judge

Claim Number 2087

In re: APEX OIL COMPANY, et al,
Debtors.

ORDER

This cause coming to be heard on Clark Oil & Refining Corporation's Proof Of Claim and Request for Payment Of Administrative Expense claims (filed March 22, 1990 and supplemented April 5, 1990), the Court having heard evidence and argument during an evidentiary hearing held on April 20 and 21, 1990, the Court having announced its findings of fact and conclusions of law on the record in this matter on April 23, 1990, and the Court being fully advised of the premises.

IT IS HEREBY ORDERED THAT the aforementioned claims of Clark Oil & Refining Corporation are allowed for any and all purposes in these bankruptcy cases, as administrative priority claims pursuant to Sections 503(b)(1) and 507(a)(1) of the Bankruptcy Code, in the amount of $6,684,866.00 *plus* interest accrued thereon in the amount of $1,024,548.56 (which reflects interest at the rate set forth in the Asset Purchase Agreement and stipulated by the parties for the period from November 22, 1988 through April 24, 1990).

The total amount of the claims allowed by this Order if $7,709,414.56.

Dated: April 4, 1990

/s/ Barry S. Schermer
BARRY S. SCHERMER
United States Bankruptcy Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 90-1604C(3)

APEX OIL COMPANY, et al.,
Appellants,

v.

CLARK OIL & REFINING CORPORATION,
f/k/a AOC Acquisition Corp.,

ORDER

(Filed: July 5, 1991)

This matter is before the Court on appeal of the Bankruptcy Court's allowance of Clark Oil & Refining Corporation's ("Clark") administrative claim in the amount of $7,709,414.56 and the denial of Apex Oil Company's ("Apex") motion for reconsideration.

Apex alleges three grounds for reversal of the Bankruptcy Court's orders: (1) the Bankruptcy Court violated Apex's right to due process because the Court did not give adequate notice that the hearing below would finally determine Clark's claim; (2) Clark failed to prove its claim by a fair preponderance of the evidence; and (3) the Bankruptcy Court erroneously excluded the testimony of a witness for Apex who had personal knowledge about the claim.

On November 22, 1988, Clark purchased a substantial portion of the assets and liabilities of Apex pursuant to an Asset Purchase Agreement. Under this agreement, Clark guaranteed that Apex's working capital for its retained assets at closing would be $15,000,000. If Apex's working capital, as determined in

accordance with the agreement was less than $15,000,000 at this time, Clark would pay the difference. If the retained working capital was not finally determined at closing, Apex was required to make a good faith estimate of the retained working capital and the cash portion of the purchase price would be adjusted accordingly. In that event, Apex would provide Clark with financial statements evidencing the closing retained working capital within thirty days. Clark was required to accept or dispute apex's financial statements and notify Apex of its decision in writing not later than thirty days after it received the financial statements. Any modification or waiver affecting the agreement was required to be in writing.

At the November 22, 1988 closing, Clark paid Apex $11,211,461 based upon Apex's estimate that its closing retained working capital was $3,788,539. Subsequently, Apex had an accounting firm, Arthur Andersen & Co., prepare a draft audit report which Clark received on January 23, 1989.[1] This draft report lists a closing retained working capital amount of $12,463,000. However, the draft was stamped "PRELIMINARY TENTATIVE FOR DISCUSSION PURPOSES ONLY". If this draft is accepted as the proper working capital adjustment, Clark contends that Apex would owe it a refund of approximately $5.8 million. Clark did not accept the draft report in writing as required by the Asset Purchase Agreement. Apex contends that the parties continued to meet throughout all of 1989 to discuss the working capital issue. Clark disputes this assertion.

On March 22, 1990, Clark filed a proof of claim with the Bankruptcy Court asserting an administrative claim of $7,014,362.98 plus interest. The majority of this claim is based

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[1] Neither party disputes that Clark agreed to extend from December 23, 1988, to January 23, 1989, the time for Apex to prepare its working capital submission.

upon the calculation of the closing retained working capital in the Andersen draft report. Clark filed its proof of claim amid several continued hearings to decide whether the Bankruptcy Court should confirm Apex's plan of reorganization. Also on March 22, 1990, Clark filed its objection to Apex's reorganization plan, arguing that Apex had failed to show it could satisfy the claim in full upon confirmation of its reorganization plan.

Over the following weeks, both Clark and Apex made a series of representations to the Bankruptcy Court that some abbreviated determination of Clark's claim should be made before the confirmation hearing resumed. At this point, the parties' interpretations/recollections as to the nature of the bankruptcy hearing agreed upon widely diverge.

Apex contends that the parties agreed on, and the Bankruptcy Court approved, having a hearing confined to an estimation of Clark's claim for the purpose of posting security. Following the confirmation of Apex's plan, Clark's claim could be liquidated at a full-scale evidentiary hearing.

Clark contends that it maintained a "two pronged" approach to the nature of the hearing. First, if the Bankruptcy Court determined that the working capital adjustment should be based on the initial draft Andersen report, then Clark maintained that no further hearing would be required. Second, if the Court determined that the draft Andersen report was not determinative on the issue, then the parties would have to conduct a "battle of accountants". Given this scenario, Clark agreed that the value of Clark's claim should be estimated for security purposes only and that the actual amount allowed on the claim would be resolved after a further hearing.

On April 5, 1990, the Bankruptcy Court advised the parties it would hold a hearing to estimate Clark's claim on April 19, 1990. The Bankruptcy Court did not enter a written order to this effect, nor did it enter any pretrial order governing the scope of discov-

ery or the presentation of witnesses. On the morning of April 19, the Bankruptcy Court conferred with the parties on the length of the hearing, and rescheduled the start of the hearing to April 20, 1990. After less than two days of argument and testimony, the parties concluded. Shortly thereafter, Judge Schermer gave an oral opinion in which he announced a final determination on the liquidation of Clark's claim. Judge Schermer emphasized that no further hearings would be held before him on this matter, absent a remand.

Apex objected to the Court's final determination of Clark's claim. Apex filed a motion for reconsideration which Clark opposed. Judge Schermer denied the motion for reconsideration after a hearing.

Due Process Violation

Fundamental due process requires that the parties receive notice reasonably calculated under all circumstances to apprise them of the nature of a hearing and to afford them an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Fundamental due process requires fair notice and warning. *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 (8th Cir. 1981).

The Court has thoroughly reviewed the transcripts and depositions in the record to determine the parties' and the Bankruptcy Court's understanding of the nature of the hearing. This review has been somewhat hampered by the absence of a transcript of the pretrial conference immediately preceding the hearing and the conflicting affidavits from the parties as to what transpired at this conference.

Apex's contention, that the parties stipulated that the hearing would be an estimation hearing for the purposes of security only, is supported by portion of the record. For example, a discussion between Mr. Roin, counsel for Clark, and Mr. Berger, counsel

for apex, at a deposition on April 16, 1990, states, in relevant part:

> MR. BERGER: We've agreed that the Debtors will not assert as an offset to the administrative claim for the purpose of this estimation hearing the letter of credit item or any of the merits or demerits of the letter of credit item identified as item 18 on the last part of Exhibit 6. This is without prejudice to the rights of either side to argue that matter at a subsequent date. The reason for that is, the hearing schedule for this Thursday is an estimation hearing, the purpose of which, we believe, is to establish a cap for the security that is to be given to AOC, if any, on its administrative claim.
>
> MR. ROIN: I hate to do this: I want a slight clarification. This is not a cap on the amount — we all agree that the estimation hearing will not cap the amount that New Clark or AOC may be entitled to when that amount if finally determined.
>
> MR. BERGER: We agree that the hearing on Thursday does not limit the right of either party to recover against the other party. The merits of that dispute will be litigated at another time.
>
> MR. ROIN: And just to be clear, my understanding is that the purpose of the hearing is to estimate the value of our claim, right?
>
> MR. BERGER: For purposes of —
>
> MR. ROIN: Security.
>
> MR. BERGER: Security.
>
> MR. MILLER: If any.

> MR. ROIN: We agree to all that stuff. I suppose there's one other thing we just mentioned, which is that the discovery in this case has been expedited to truly unbelievable heights, and we both agree that we may need to do some or all of this discovery over again when and if we have a dispute on the merits of the allowance of the claim.
>
> MR. BERGER: That's all right.

Nicolet Deposition at 86-88. Also in support of Apex's position is a discourse between the Court and the parties on April 19, 1991:

> THE COURT: Let's be clear on what we're doing starting tomorrow. Are we liquidating this claim, which is I thought what we were here to do?
>
> MR. ROIN: No, Your Honor, we are estimating the value of the claim.
>
> THE COURT: For purposes of allowance for treatment under the plan.
>
> MR. ROIN: Essentially for security purposes.

Transcript (April 19, 1990) at 7-8. Thus, Apex's contention about the nature of the hearing is supported by the record.

However, Clark's position, that it understood a "two-pronged" approach to the nature of a hearing, also is supported by the record. In Clark's opening statement on the first day of the hearing, Mr. Roin stated:

> I've taken Your Honor's suggestion from the pre-trial and I will not repeat the arguments made in our trial brief, and I know the Court is well versed in our two pronged approach at this estimation hearing. An because it's an estimation hearing, we're simply estimating, not liquidating the claims.
>
> . . .

* * * *

> What we're asking the Court to do is to estimate the value of that claim, and we believe that if the claim was resolved in early 1989, that estimation would be a basis for ultimately liquidating the claim without further hearings. If, on the other hand, the court finds that there was no resolution in accordance with the contract in early 1989, then we recognize that it may be appropriate to have further proceedings to liquidate the final amount of the claim.

Transcript (April 10, 1990) at 7-11. Contrary to Apex's contentions, this statement reveals that the Court had discussed the "two-pronged" approach with the parties. The statement also reveals that, while Clark did not anticipate that Apex's claim would be liquidated at the conclusion of the hearing, Clark did anticipate that no further hearings would be necessary.

After examining the entire record, the Court concludes that the parties had not come to an agreement as to the nature of the hearing and whether further hearings would be required. Nonetheless, Judge Schermer's understanding of the nature of the hearing is unequivocal. At the outset of the hearing, Judge Schermer stated:

> In the matter of Apex Oil Company, the objection of Clark Oil and Refining Corporation to the debtor's first amended plan. And while it's styled an objection, it will be treated as a liquidation of the post-petition 507(a)(1) claim. By agreement of the parties, this hearing will be conducted as an estimation of the claim, and that amount will be liquidated for purposes of treatment under the plan.

Transcript (April 20, 1990) at 5. At the conclusion of Mr. Roin's opening statement, the Court reiterated:

> Mr. Roin, what we'll do today . . . [is] liquidate the claim by process of estimation, reserving so much of your objection

> as goes to feasibility of the plan, as well as the treatment which you claim will receive, either cash confirmation or such other . . . payment terms as you may consent to, so those two latter issues will be reserved.

Transcript (April 20, 1990) at 11. Apex did not object to either of these statement. At the conclusion of the hearing, the Court again stated, "... this was the hearing, as I advised you at the start of the hearing, on the determination of the amount of allowed claim, if any of Clark. I have found it; I don't intend to ... hear it again."

Apex relies on *In re The Rene Press, Inc.*, 29 Bankr. 446 (Bankr. 1st Cir. 1983), to support its argument that the Court denied Apex due process in determining Clark's claim after the hearing. In *Rene*, the Court indicated at the hearing that the argument might not be complete but terminated the hearing to allow the U.S. trustee time to prepare a recommendation. *Id.* at 447-48. In addition, the Court stated that, after the recommendation, it would "pick it up at that point and carry on, so to speak." *Id.* at 447. The appellate court concluded that the court below mad made several statements from which a reasonable attorney could conclude that the court would provide further opportunity for argument. *Id.*

Rene is distinguishable from the case before this Court. Unlike the court in *Rene*, Judge Schermer's statements at the hearing were unequivocal. Judge Schermer stated on more than one occasion that the purpose of the hearing was to liquidate Clark's claim and the Court was unable to locate any contradictory statements made by Judge Schermer.

Apex's reliance on *Odom Enterprises, Inc. v. Internal Revenue Service*, 25 Bankr. 313 (Bankr. E.D. Ark. 1982), similarly is distinguishable. In *Odom*, the reviewing court found that the bankruptcy court's proposed action as communicated to the parties was materially different than the action the court took. *Id.*

at 314. This Court has found no evidence in the record to indicate that Judge Schermer misled the parties in this case.

Apex's contention, that the statement by Judge Schermer that the hearing was to proceed by agreement of the parties was sufficiently misleading so as to make this case indistinguishable from *Rene* and *Odom,* is not persuasive. First, the Court has found that the parties had no clear agreement. Second, the subsequent statements by Judge Schermer, that the purpose of the hearing was to liquidate Clark's claim, render any reliance on this statement by Apex unreasonable.

Based on the foregoing, and under even the strictest standard of review, the Court finds that Apex was not deprived of fair notice about the nature of the hearing and the possible outcome; thus, Apex has not shown a due process violation. Moreover, the Court notes that the conference between the parties and the Bankruptcy Court immediately preceding the hearing is not on the record. The Court must defer to Judge Schermer's interpretation as to what transpired at the pretrial conference.

Clark's Burden of Proof

Next, Apex contends that Clark did not prove its administrative claim by a fair preponderance of the evidence. The Bankruptcy Court concluded that under the Asset Purchase Agreement ("APA"), the working capital adjustment must be calculated based on information available on or before January 3, 1989, and that the best source of this information is the draft Andersen report. Apex contends that this report was preliminary, was not accepted in writing by Clark as required under the APA, and is not an accurate assessment of its working capital at the time of closing. Apex had a second report prepared shortly before the commencement of trial in April 1990, that it asserts should be the basis for determining the amount of its working capital at closing. The Bankruptcy Court concluded that, regardless of the accuracy of this second report, the intention of the

parties as expressed in the APA was to determine the working capital amount within sixty days of closing. Apex further contends that through subsequent course of conduct by the parties, the APA was modified to extend the time for determining the working capital. The Bankruptcy Court found no support for this contention at the hearing.

Again, even under the strictest standard of review, the Court concurs in the Bankruptcy Judge's interpretation of the contract based on the evidence presented at the hearing. Furthermore, the record amply supports the Bankruptcy Court's conclusion.

The APA expressly required Apex to provide information concerning working capital "[n]ot later than thirty (30) days after the Closing Date." APA § 3.1 at 16. It is not contested that by agreement of the parties, the thirty days was changed to sixty days. Moreover, Apex's counsel did not dispute that the intent of the sixty-day limit in the agreement was to look at the working capital sixty days after closing and "not more accurately, as experience would dictate." Transcript, April 20, 1990, at 16. In addition, Mr. Siebert, an employee of Arthur Andersen & Company who was involved in preparation of the draft report, indicated that the report reflects the best available information within the sixty day limit. *Id.* at 351. .

With respect to Apex's assertion that the parties further modified the sixty-day provision, the evidence adduced at trial does not support this assertion. Apex presented testimony of Mr. Mark Nicolet, Apex's chief financial officer, related to this issue. Mr. Nicolet testified about various meetings on the amount of working capital between the parties. However, he also indicated that these discussions were not productive because the issues would have to be resolved by "higher-ups." Transcript (April 10, 1990) at 289-90. This testimony does not indicate that the parties waived or modified the sixty day limit.

Apex fiercely objects to the Bankruptcy Court's strict interpretation of the sixty-day limit in light of Clark's failure to comply with the provision of the APA which requires Clark to accept or dispute Apex's financial information in writing. The Court does not find this fact significant given the overall intent of the parties to determine the retained working capital within sixty days of the closing and the undisputed evidence that the draft report is the best estimate of this amount.

Exclusion of Mr. Catanzaro's Testimony

Finally, Apex alleges that the Bankruptcy Court improperly excluded Mr. Catanzaro's testimony. It is uncontested that the parties agreed to identify their witnesses and to make them available prior to trial. Pursuant to that agreement, Clark took the deposition of the two witnesses that Apex disclosed, and Apex took the deposition of the two witnesses that Clark disclosed. On the last day of the trial, Apex announced that it intended to call Joseph Catanzaro as its first witness. Apex asserted that the agreement to disclose witnesses did not apply because Mr. Catanzaro was a rebuttal witness.

Clark objected to the testimony of Mr. Catanzaro based on this agreement. The Bankruptcy Court sustained the objection and excluded Mr. Catanzaro for three reasons: (1) the agreement among counsel to disclose witnesses prior to trial; (2) even if that agreement did not pertain to rebuttal witnesses, Mr. Catanzaro does not qualify as a rebuttal witness; and (3) "[s]ince the decision to . . . use . . . [Mr. Catanzaro] as a rebuttal witness was made after Mr. Melnuk's testimony . . . concluded around 4:00 o'clock yesterday . . . it is grossly unfair that that decision . . . [was not communicated sooner]." Transcript (April 20, 1990) at 268.

The Court has reviewed the record relating to this issue and concurs in Judge Schermer's ruling excluding Mr. Catanzaro. Thus, the Court finds Apex's assertions of error are without

merit. Based on the foregoing, the Court also finds no error in Judge Schermer's denial of Apex's motion for reconsideration.

Accordingly, after careful review,

IT IS HEREBY ORDERED that Apex's appeal of the Bankruptcy Court's allowance of Clark's administrative claim and denial of Apex's motion for reconsideration is dismissed.

IT IS HEREBY FURTHER ORDERED that the decisions of the Bankruptcy Court are affirmed.

IT IS HEREBY FURTHER ORDERED that Apex shall bear the costs of this appeal.

/s/ William L. Hungate
United States District Judge

Dated: 7-5-91

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2833

In re: Apex Oil Company, et al.
Debtors.

Apex Oil Company, et al.,
Appellants,

v.

Clark Oil & Refining Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: February 13, 1992
Filed: March 6, 1991

Before BOWMAN and WOLLMAN, Circuit Judges, and WOODS,* District Judge.

WOODS, District Judge.

I. BACKGROUND

This bankruptcy appeal revolves around the sale of assets from Apex Oil Company (hereinafter "Apex") to Clark Oil & Refining Corporation (hereinafter "Clark") in a post-bankruptcy agreement. By terms of the agreement, the purchase price would be an amount which would leave Apex with $15,000,000 in closing retained working capital (hereinafter "CRWC") to operate the businesses retained by Apex. Even though the $15,000,000

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

figure referred to the retained capital at the time of closing, the parties recognized that the exact amount of retained capital could not be determined on that date. Therefore, they agreed that Apex would make a good faith estimate at the time of closing, then, within 30 days (later extended to 60 days by the parties), submit to Clark a financial statement indicating the CRWC. Clark would have 30 days to accept or contest Apex's calculation of the CRWC. When the parties arrived at the final CRWC figure, if the estimate was low, then Apex would refund Clark the difference. Conversely, if the estimate turned out to be high, Clark would pay Apex the difference.

Apex submitted its financial statement, which was not signed by its accounting firm (Arthur Andersen). Clark did not accept the statement of CRWC in writing, as called for by the Agreement. The financial statement indicated that Clark had overpaid Apex by several million dollars.

Subsequently, in its Chapter 11 reorganization plan filed with the bankruptcy court, Apex failed to address the debt owed to Clark for its overpayment of CRWC. Clark filed an objection to Apex's plan on that basis. Clark also filed a claim in the amount of $7,014.382.98 [sic] plus interest for the working capital adjustment.

Prior to the hearing on Apex's plan, the bankruptcy judge on April 5, 1990 set a hearing for April 19, 1990 to deal with the Clark objection and claim. The crux of Apex's argument on appeal is that it was not given sufficient notice that the hearing on the Clark objection would result in a final determination of the amount owed. Apex claims that this lack of notice amounted to a denial of due process.

The bankruptcy judge held the hearing previously noticed and found that Apex owed Clark a total of $7,709,414.56, which

included interest on its claim. Apex appealed to the district court,[1] asserting three grounds:

> (1) the Bankruptcy Court violated Apex's right to due process because the Court did not give adequate notice that the hearing below would finally determine Clark's claim; (2) Clark failed to prove its claim by a fair preponderance of the evidence; and (3) the Bankruptcy Court erroneously excluded the testimony of a witness for Apex who had personal knowledge about the claim.

(Add. 20). The district judge affirmed the bankruptcy court. In its appeal to this court, Apex raised only issues (1) and (3), *supra*. We affirm.

II. LACK OF NOTICE

The bankruptcy court on April 5, 1990, set a hearing on the Clark claim for April 19, 1990. After conferring with counsel on April 19, regarding preliminaries, the actual hearing began on April 20. Counsel for Apex contended that its understanding was that the hearing was to be confined to an estimate of Clark's claim for the purpose of posting security. The Clark counsel's understanding of the hearing was that it would be final, providing the court accepted the first Arthur Andersen report.

Regardless of the understanding of counsel, it is clear than the bankruptcy judge intended to dispose of the Clark claim with finality. At the outset he informed the parties that the hearing would be "treated as a liquidation of [Clark's] post-petition 507A claim." (App. III: Tr. Apr. 20-21, 1990 at 5). He added:

> By agreement of the parties, this hearing will be conducted as an estimation of the claim, and that amount will be liquidated for purposes of treatment under the plan.

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[1] The Honorable William L. Hungate, United States District Judge, Eastern District of Missouri, Eastern Division.

Id. After the opening statements by Clark's counsel, the bankruptcy judge stated: "What we'll do . . . today and tomorrow [is] liquidate the claim by process of elimination." (App. III, Tr. Apr. 20-21, 1990 at 11). During closing argument the bankruptcy judge stated that he would "decide toady or whenever the amount of money that is due Clark." (*Id.* at 381).

Such categorical statements by the trial court drew no objection from counsel for Apex. Indeed at the close of Clark's case, he moved "to have the claim disallowed." (*Id.* at 263). Here the court in no uncertain terms told the parties before, during, and after the hearing that he planned to rule on Clark's claim. There was no objection by either party. Under these circumstances, there was no denial of due process. *See McGraw-Edison Company v. Central Transformer Corporation*, 308 F.2d 70 (8th Cir. 1962); *In the Matter of Muller*, 851 F.2d 916, 919 (7th Cir. 1988), *cert. denied, sub nom., Roger v. First Nat. Bank of Peoria*, 490 U.S. 1007 (1989); *In the Matter of Georgetown Apartments*, 468 F.Supp. 844, 851 (M.D. Fla. 1979).

III. EXCLUSION OF THE TESTIMONY OF AN APEX WITNESS

The district court found that "[i]t is uncontested that the parties agreed to identify their witnesses and to make them available prior to trial." (Add. 31). On the last day of trial, Apex attempted to call Joseph Catanzaro, who had not previously been disclosed as a witness. Apex tried to avoid the agreement by claiming that Catanzaro was a rebuttal witness.

The bankruptcy court sustained an objection to this testimony for three reasons, which were summarized by the district judge as follows:

> (1) [T]he agreement among counsel to disclose witnesses prior to trial; (2) even if that agreement did not pertain to rebuttal witnesses, Mr. Catanzaro does not qualify as a

> rebuttal witness; and (3) "[s]ince the decision to . . . use . . . [Mr. Catanzaro] as a rebuttal witness was made after Mr. Melnuk's testimony . . . it is greatly unfair that the decision . . . [was not communicated sooner]." (App. III, Tr. (April 20, 1990) at 268.

(Add. 32).

We agree with the district court that the assertion of error is without merit. The proffer of this witness was a clear violation of the agreement by the parties. The bankruptcy judge did not abuse his discretion in excluding his testimony. *Gossett v. Weyerhaeuser Co.*, 856 F.2d 1154, 1156-57 (8th Cir. 1988).

Neither do we find error in the ruling by the bankruptcy judge that Catanzaro was not a proper rebuttal witness. Apex claimed that he was needed to rebut the testimony of Clark's witness Melnuk. Apex knew or should have known the content of Melnuk's testimony because his deposition was taken three days before trial. In *Smith v. Conley*, 584 F.2d 844, 846 (8th Cir. 1978), this court noted that "[p]laintiff can make no reasonable claim of ignorance as to defendant's theory." Thus, responsive testimony was excluded as improper rebuttal evidence. The exclusion of rebuttal testimony was also held proper where the testimony should have been elicited during the case in chief. *Gossett v. Weyerhaeuser Co., supra.* "[A] defense witness whose purpose is to contradict an expected and anticipated portion of the plaintiff's case in chief can never be considered a 'rebuttal witness,' or anything analogous to one." *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 333 n.2 (5th Cir. 1981), quoting *Morgan v. Commercial Union Assurance Co.*, 606 F.2d 554, 556 (5th Cir. 1979). The bankruptcy court's decision that it would have been unfair to have permitted the Catanzaro testimony was not unreasonable. Catanzaro was not brought forward until the witness he was supposed to rebut had left for Canada. (App. III, Tr. apr. 20-21, 1990 at 270-71).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2833EMSL

Apex Oil Company, et al.,
Appellants,

vs.

Clark Oil & Refining Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

The petition for rehearing by the panel is denied.

April 6, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit